Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1420

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and THE BEACON MUTUAL INDEMNITY COMPANY,

Petitioners,

v.

ARTHUR ANDERSEN & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

George A. Katz
Douglas S. Liebhafsky
Michael W. Schwartz
Counsel for Petitioners
299 Park Avenue,
New York, New York 10017
Tel. No.: (212) 371-9200

Wachtell, Lipton, Rosen & Katz
Of Counsel

April 13, 1977

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CITATIONS

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No._____

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

ARTHUR ANDERSEN & CO., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, respondents in the Court below and plaintiffs in the District Court, pray that a writ of certiorari issue to review or correct the writ of mandamus directed to the United States District Court for the Southern District of New York (Hon. Henry F. Werker) by the United States Court of Appeals for the Second Circuit on April 12, 1977.

OPINIONS BELOW

The opinion of the United States District Court

for the Southern District of New York (Hon. Henry F. Werker), determining that that Court should charge a jury, then deliberating, that the jury might return a verdict as to certain state-law claims upon the agreement of five-sixths of the jurors, is reproduced as Exhibit A hereto. It has not been officially reported.

The order of the United States Court of Appeals for the Second Circuit issuing a writ of mandamus to the District Court directing that such charge not be given, and its opinion in connection therewith, is reproduced as Exhibit B hereto. It has not been officially reported.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered on April 12, 1977.

QUESTION PRESENTED

Did the Court of Appeals exceed its authority under 28 U.S.C. § 1651(a) in issuing a writ of mandamus to the District Court merely because it disapproved of a jury charge which that Court proposed to give?

STATUTE INVOLVED

The statute involved herein is 28 U.S.C. § 1651(a) under which "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

After a six-and-a-half month trial in the United States District Court for the Southern District of New York, in an action brought by petitioners on both federal law claims and pendent state law claims, the case was submitted to the jury on March 29, 1977, under a charge that required any verdict to be unanimous. Several days thereafter, and after some indication that the jury might be deadlocked, the District Judge, upon application by petitioners, determined to give a supplemental jury instruction to the effect that the jury would be permitted, in accordance with the law of the forum state, to reach a verdict on petitioners' state law claims by a five-sixths majority. The District Judge wrote a carefully reasoned opinion* in support of this decision, relying

* The District Judge's opinion appears as Exhibit A hereto.

upon recent "jury" decisions of this Court, notably Colgrove v. Battin 413 U.S. 149 (1973), and upon the "Erie" doctrine. Thereafter, the District Court orally modified its opinion to add, as an alternative ground for decision, Rule 83 of the Federal Rules of Civil Procedure and Rule 15 of the Civil Rules of the United States District Court for the Southern District of New York (providing for use of New York State procedure in the District Court's discretion in the absence of a governing federal rule). Pursuant to 28 U.S.C. § 1292(b), the District Judge certified the question of the correctness of his ruling for interlocutory review by the Court of Appeals, and stayed the giving of the supplemental charge pending application to the Court of Appeals by the respondents.*

On Monday, April 11, respondents herein (petitioners-defendants below) filed with the Court of Appeals their Joint Petition for Leave to Appeal under § 1292(b) in which they asked, in the alternative, for the issuance of a writ of mandamus or prohibition directed to the District Judge

* The District Court's certificate appears as Exhibit B in Section II of the Appendix to petitioners' motion for expedited consideration, filed herewith (the "Appendix").

(the "Joint Petition"). The Joint Petition did not specifically brief either the availability of § 1292(b) jurisdiction or the propriety of the issuance of an extraordinary writ.*

On Tuesday morning, April 12, petitioners filed their Answer to the Joint Petition, not only setting forth their view that the proposed supplemental charge was entirely proper, but also demonstrating that the Court of Appeals could not properly take jurisdiction under § 1292(b) because a decision on the certified question would not "materially advance the ultimate termination of the litigation," as that statute requires.** Petitioners further pointed out to the Court of Appeals that there was absolutely no need for interlocutory review, and that respondents would

* The Joint Petition and the Appendix thereto appears as Sections II and III of the Appendix hereto.

** A copy of petitioners' Answer in the Court of Appeals (the "Answer") appears as Section III of the Appendix. Exhibit A to the Answer, additional pages from the trial transcript not included in the Appendix to the Joint Petition, contains (at pp. 14132-34, 14141-42) supplemental reasons in support of the District Court's opinion, and the District Court's adoption thereof.

not be prejudiced — and petitioners would be — if that Court by-passed normal appellate procedures. See Point I of the Answer.

At the close of argument, the panel announced from the bench that it was issuing the extraordinary writ ordering the District Court not to give the proposed charge.

In its opinion, a copy of which is annexed as Exhibit B hereto, the panel stated that the proposed charge could not be given. This decision rested on an erroneous reading of Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958). The Court of Appeals also held that, so far as the District Judge might have had discretion under a local rule, his decision to give the charge threatened the integrity of the jury's deliberations and risked jury confusion because of the earlier unanimity charge.

Following the decision of the Court of Appeals, the respondents moved in the District Court that the jury be discharged. This motion was denied, and the jurors were instructed to continue their deliberations.

They are doing so now.*

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN ISSUING A WRIT OF MANDAMUS.

The action of the Court of Appeals herein was completely inconsistent with this Court's decisions in Will v. United States, 389 U.S. 90 (1967), and Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943). The Court below has committed the fundamental error of issuing an extraordinary writ when the worst that could be said of the District Court's action is that it might have been erroneous as a matter of law. Will and Roche specifically forbid the use of mandamus, and the by-passing of ordinary appellate procedures, for such a purpose.

* Because the relief sought by the present petition — the giving of the proposed charge to the jury — will be rendered unavailable if the Court of Appeals is not reversed before the jury is discharged, petitioners are filing herewith a motion for expedited consideration of this petition. As is set forth in said motion, it is urgently necessary that this Court review the Court of Appeals' action in the immediate future.

See 389 U.S. at 95-99, 103-04; 319 U.S. at 26. Thus the action of the Court of Appeals is contrary to the most basic principles of the proper use of appellate power and to principles of sound judicial administration generally.

Moreover, in the present case, regular appellate review is only a matter of weeks, or at most months away: it must be emphasized that the jury is now actually deliberating, so that a verdict -- if one can be reached -- can be reviewed in the ordinary course in the very near future.* This is not a case where the District Court's action is such that it can never otherwise be reviewed, or where regular review lies only a long distance in the future. Compare In re Turpentine & Rosin Factors, Inc., 238 F.2d 458, 460 (5th Cir. 1956). Plainly, mandamus is improper under such circumstances. In re Turpentine & Rosin Factors, Inc., supra.

* Should the jury still be unable to reach a verdict, the issue of the propriety of the proposed charge will never have had to be decided by the Court of Appeals.

All the more is this true when the action of the District Court to which the writ was directed -- the giving of a supplemental jury charge -- is the very type of action to which careful appellate consideration is normally given in the regular appeal process.

For the foregoing reasons, respondents cannot possibly be prejudiced by reversal of the Court of Appeals by this Court: they have the right to appeal in the regular course should the jury return a verdict.

Indeed, the practical effect of the Court of Appeals' behavior is to frustrate the regular appellate process; mandamus here is not "in aid of" its jurisdiction as the "All Writs" Act requires. 28 U.S.C. § 1651 (a). Thus, by virtue of the issuance of the writ, the District Court is of course precluded from giving the proposed supplemental charge. But it follows that, if the writ stands, the complex and difficult legal issues raised by the proposed charge -- i.e., the status of the requirement of civil jury unanimity in the federal District Courts; the applicability of the principles of the "Erie-Byrd-Hanna" line of cases to a state statute

permitting non-unanimous verdicts; the discretion of the district courts under local rules — will never be given careful consideration by the Court of Appeals, for no one can pretend that the hurried, limited consideration given to the Joint Petition below merits that description.

Further, although respondents would not be prejudiced by the denial of an extraordinary writ, petitioners are gravely prejudiced by the issuance thereof. For the action of the Court of Appeals denies petitioners review by this Court of the legal questions raised by the proposed charge: if the proposed charge is not given — as it will not be unless this Court reverses the Court of Appeals — that Court will in effect have become the court of last resort.

Finally, the use of mandamus is utterly improper here because, under the familiar and well-settled test for its issuance, it simply cannot be said that the action of the District Court presented "exceptional circumstances amounting to a judicial 'usurpation of power'. . ." Will v. United States, supra, 389 U.S.

at 95. Thus the legal conclusion reached by the District Court, though it may be erroneous, is supported by substantial judicial and textual authority, including opinions of this Court. See, e.g., Colgrove v. Battin, 413 U.S. 149 (1973) (Seventh Amendment does not preserve common-law "incidents" of jury trial); Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion) (Sixth Amendment does not require jury unanimity in State criminal trials); Johnson v. Louisiana, 406 U.S. 356 (1972) (plurality opinion) (due process does not require jury unanimity in State criminal trials); Byrd v. Blue Ridge Rural Electric Cooperative, Inc., supra; Wieser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975) (Seventh Amendment does not require unanimity; majority verdict in accordance with state procedure may be appropriate in diversity case); Wright, Law of Federal Courts § 94, at 463 n.5 (3d ed. 1976) (while "there are no recent [Supreme Court] opinions on the requirement of unanimity in civil cases, . . . if the issue should arise, it seems very likely that the Court would hold that unanimity is not required") (emphasis added). We are not arguing now the merits of the District Judge's decision; but it seems almost too

plain for argument that, with such substantial authority behind it, his opinion and order are simply not the stuff of which mandamus is made.*

However, we note that, far from castigating the District Court, the Court of Appeals should, if it acted at all, have sustained him. Thus the Court of Appeals simply failed to give any credit at all to the District Court's imaginative attempt — fully consistent with recent decisions of this Court designed to assure that the jury remains a useful instrument in the administration of justice, and not a hindrance thereto — to salvage a verdict from a six-and-one-half month trial. The Court of Appeals ignored that the Byrd

* We do not have the Court of Appeals' views on why Will v. United States does not control, since it did not even cite that case. See Exhibit B hereto. However, we note that no serious contention can be made that its action was proper under the so-called "supervisory mandamus" doctrine recognized in Schlagenhauf v. Holder, 379 U.S. 104 (1964), and La Buy v. Howes Leather Co., 352 U.S. 249 (1957). Thus there is no showing here either of a "studied disregard of the limitations placed upon the district courts by the federal rules", Will v. United States, supra, 389 U.S. at 100 (discussing La Buy) or of a "persistent disregard of the federal rules," id. at 104 n.22 (discussing Schlagenhauf). All that has happened is that a district judge has issued a carefully written opinion with which the Court of Appeals disagrees. But the Court of Appeals will get its turn in due course; here it has not "supervised" the District Court but improperly intruded into that Court's province.

case specifically and unmistakably requires that state law be followed on state law claims even if it is denominated procedural, see 356 U.S. at 536-37 — assuming, as the District Court held was true here, no countervailing Federal Rule or strong federal policy. And the Court of Appeals cavalierly, on a hurry-up basis, substituted its judgment for that of the District Court on proper control of a jury which the District Court, not the Court of Appeals, has lived with through more than half a year of trial.

In sum, it is the Court of Appeals, not the District Court, which has overstepped its limits here. In the interest of preserving the proper division of responsibilities between trial and appellate courts in the federal system, this Court must reverse the Court of Appeals.

Conclusion

For the reasons above stated, this Court should (a) grant the instant petition on an expedited basis, (b) reverse the Court of Appeals, and (c) authorize

the District Court to deliver the supplemental charge which perceives the law as it is to that Court.

Respectfully submitted,

George A. Katz
Douglas S. Liebhafsky
Michael W. Schwartz
Counsel for Petitioners
Office & P. O. Address
299 Park Avenue,
New York, New York 10017
Tel. No.: (212) 371-9200

Wachtell, Lipton, Rosen & Katz
Of Counsel
April 13, 1977

Exhibits

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA, CITIZENS MUTUAL INSURANCE COMPANY, WORCESTER MUTUAL FIRE INSURANCE COMPANY, and the BEACON MUTUAL INDEMNITY COMPANY,

Plaintiffs,

- against -

ARTHUR ANDERSEN AND COMPANY,

Defendant and Third-Party Plaintiff,

- against -

JOSEPH A. BONURA, EMPIRE NATIONAL BANK (as successor in interest to County National Bank), LYNDA DICK as Executrix of the Estate of Jack R. Dick, and HERMAN L. MECKLER,

Third-Party Defendants,

and

ARISTOCRAT ANGUS RANCH, BEN R. HOUSTON, and CHARLES ALEXANDER,

Third-Party Defendants.

OPINION

71 Civ. 4036 (HFW)

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

Plaintiffs brought this action in the United States District Court in 1971 stating two causes of action, one under section 10(b) and rule 10b-5 of the Securities Exchange Act of 1934 for fraud and the other for common law fraud under New York law. The causes of action as originally alleged involved loans

BEST COPY AVAILABLE

made in 1968 and 1969. I have held that only the 1968 loan is within the orbit of the securities law violation. Both the 1968 and 1969 loans were, however, the subject of the pendent common law fraud claims.

After more than five years of discovery and more than six months of trial the case was given to the jury under instructions that a unanimous verdict must be returned upon both the securities law claim and the pendent common law fraud claims.

Judicial economy and the efficient administration of justice dictated the bringing of this action in the federal court. Had plaintiffs brought the actions in New York state court it would have probably been removable to this court. To have brought two actions, one in federal court and the other in state court, would have been wastful of the limited judicial resources in both courts.

The jury has deliberated for six days. There is some evidence of disagreement or "lack of common ground" among them without any indication as to whether the majority is for the plaintiffs or the defendants. Despite this evidence, the jury has nevertheless continued to call for documentary evidence and the reading of certain testimony. Plaintiffs have now moved that the court instruct the jury that it could arrive at a five-sixths verdict at least with respect to the common law fraud claims and possibly with respect to the securities law claim.

I have rejected the suggestion that a five-sixths verdict would apply to the securities law (the federal question) as being inimicable to the existing federal rule with respect to trial by jury. I am further of the opinion that uniformity is desirable with respect to federally created causes of action triable by jury. I do not include diversity cases within this category since in those cases the cause of action exists in the state and only jurisdiction to hear them is conferred.

I am persuaded that with respect to the common law fraud causes of

action stated in the pendent claims the jury may reach a verdict if five-sixths of their number agree.

The policies expressed in the Erie rule as discussed in Hanna v. Plumer, 380 U.S. 460, 467 (1965), are the prevention of the unfairness caused by a different result in the litigation depending upon the jurisdiction in which the case was brought and the prevention of forum shopping. Both of these policies are served here by deferring to the state rule. In an earlier case, Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958), the Supreme Court had expanded on the significance of the Erie doctrine in noting that its purpose was not only that "the federal courts in diversity cases respect the definition of state-created rights and obligations by the states courts," Id. at 535, but that it was more broadly,

> "that the federal courts should conform as near as may be — in the absence of other considerations —to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule." Id. at 536-7.

There is a likelihood in this case that a different outcome would prevail depending upon whether this action was brought in state or federal court. In the event that although on a unanimous basis no verdict could be reached but one could be reached if the agreement of only five of the six jurors were required, the trial could conceivably end in a mistrial if brought in federal court, whereas if brought in state court a conclusion would be reached one way or another.

In my view the Erie doctrine as explained and expanded by Hanna and Byrd dictates the application of New York state's rule pursuant to CPLR 4113(a) (McKinney 1963), under which a five-sixths verdict is prescribed for civil cases. In weighing the interests of New York state in favor of having a non-unanimous verdict as against the interests of the federal courts in favor of a unanimous

verdict, no strong countervailing federal policies may be discerned which would require insistence upon the federal rule with respect to the pendent common law claims. On the contrary, the interests behind a unanimous verdict are quite nebulous. By way of contrast, an admirable purpose is served by the state rule, which was enacted to reduce the economic loss of jury disagreement and to obtain a fairer expression of the jury's belief. 1 N.Y. Judicial Council Report 41 (1935).

As a series of Supreme Court cases defining the attributes of trial by jury under the sixth and seventh amendments as applied to the states by reason of the due process clause of the fourteenth amendment has indicated, the significance of the sixth and seventh amendments has been in insuring that the judgment of a cross-section of the community serve as the agent determining guilt or innocence, in the case of a criminal trial, or the verdict, in the case of a civil trial. It is not necessary that all of the trappings of a jury trial as it existed at common law be incorporated in a trial by jury today. The Supreme Court's discussion of the function of the jury in criminal cases in Apodaca v. Oregon, 406 U.S. 404 (1972), highlights the point that no strong federal policy could exist favoring the principal of unanimous jury verdicts in civil trials.[1] As that court said:

> "As we said in Duncan, the purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' Duncan v. Louisiana, 391 U.S., at 156. 'Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen. . . .' Williams v. Florida, supra, at 100. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in Williams, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries requred to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served."

Id. at 410 (footnote omitted). Furthermore, the Supreme Court noted in Johnson v. Louisiana, 406 U.S. 356 (1972), in upholding a Louisiana statute calling for a jury of twelve with verdict by nine out of twelve in criminal cases where the punishment called for is hard labor, that neither unanimity nor a jury of twelve in a criminal case had ever been held to be a violation of due process. It was further the court's view that, "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." Id. at 360. In light of these cases, the persuasiveness of earlier Supreme Court cases discussing the requirements of a jury trial in criminal and civil cases is questionable. Cf. American Publishing Co. v. Fisher, 166 U.S. 464 (1897) (invalidating a territorial statute calling for a nine out of twelve verdict because unanimity was deemed an essential feature of trial by jury at common law); Patton v. U.S., 281 U.S. 276 (1930) (stating in dictum that unanimity was essential in a jury trial).

That no strong policy exists in incorporating all of the traditional characteristics of the jury trial in federal court is exemplified by the ruling in Colgrove v. Battin, 413 U.S. 149 (1973),[2] upholding a local rule calling for a jury trial in civil cases with fewer than twelve jurors. The unanimity requirement may not be viewed as being any more significant than a specified number of jurors. The importance of trial by jury lies rather in the fact of a body broadly representing the

community deliberating and issuing a verdict for one party or another. Moreover, the very fact that Rule 48 of the Federal Rules of Civil Procedure provides for a stipulation by the parties to a less than unanimous verdict attests to the fact that no need for an iron-clad policy has been felt. This case is distinguishable in this regard from the one considered by the Supreme Court in Byrd v. Blue Ridge Cooperative where the federal policy found to supersede that of the state was that of favoring decisions by the jury where disputed questions of fact required resolution. Here it can hardly be said that the federal policy is in dispute with that of the state much less that the federal policy is a strong one, Weiser v. Chrysler Motors Corp., 69 F.R.D. 97 (E.D.N.Y. 1975), where the issue is not whether or not a jury or the court is to determine an issue, but whether five or six people will have to decide the verdict.

An argument could be made that the federal courts have an interest in maintaining uniformity of procedure and that this policy should be carried out here. However, in a case such as this one, where the claimant has introduced a pendent state claim into federal court, it is not unreasonable to require him to conform to a rule of the state concerning jury verdicts. Furthermore, no more administrative difficulty would exist in directing a unanimous verdict on some but not all claims than would exist where certain claims must be tried to the court and others to the jury.

Finally, there can be no claim of prejudice to any party here by reason of my decision to direct a five-sixths verdict on plaintiffs' state claims. Counsel would have acted no differently had they known from the start of the trial that this would be the case. Moreover, no party's interest is served by a mistrial in which event enormous resources in time and money will have been expended on a six month trial to no avail. If by reason of my ruling here a verdict is reached by

the jury, the interests of all will have been served because there will have been an end to the litigation with tangible results on the basis of which an appeal may be taken by any losing party.[3]

SO ORDERED.

DATED: New York, New York
April 7, 1977

U. S. D. J.

STATE MUTUAL LIFE ASSURANCE CO. v. ARTHUR ANDERSEN
71 Civ. 4036

NOTES

1. See C. Wright, Law of Federal Courts (3d ed. 1976) § 94 at 463:

"Although it has long been supposed that another of these essential elements of trial by jury was, except as waived by the parties a unanimous verdict of 12 jurors, the Supreme Court has upheld local rules providing for civil juries of fewer than 12, and whether a unanimous verdict is constitutionally required is now a matter of doubt."

In a footnote, Id. n.5, Professor Wright states:

"The Seventh Amendment was held to require a unanimous verdict in American Publishing Co. v. Fisher, 1897, 17 S. Ct. 618, 619, 166 U.S. 464, 468, 51 L.Ed. 1079. More recently the court has held that the Fourteenth Amendment does not require a unanimous verdict in a state criminal case, Apodaca v. Oregon, 1972, 92 S. Ct. 1628, 406 U.S. 404, 32 L. Ed. 2d, 184 but that the Sixth Amendment requires a unanimous verdict in a federal prosecution. There are no recent opinions on the requirement of unanimity in civil cases but if the issue should arise, it seems very likely that the court would hold that unanimity is not required."

2. See cases and authorities cited in n.4, Id.

3. Judge Neaher suggests in Wieser v. Chrysler Motors Corp., 69 F.R.D. at 101, that an issue of the law of the case may be raised by the fact that I have already delivered a charge requiring a unanimous determination by the jury. In the Weiser case, unlike this one, a mistrial had already been declared and the jury dismissed when Judge Neaher made his ruling. In any event, however, my previous ruling to the effect that a unanimous verdict will be required is hereby withdrawn.

APPEARANCES:

Attorneys for Plaintiffs:

WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10017

By: George A. Katz
Douglas S. Liebhafsky
Michael W. Schwartz
Of Counsel

Attorneys for Defendant and Third-Party Plaintiff Arthur Andersen & Co.:

DUNNINGTON, BARTHOLOW & MILLER
161 East 42nd Street
New York, New York 10017

By: William M. Bradner, Jr.
John A. Stichter
Roger R. Crane, Jr.
Of Counsel

and

WILSON & McILVAINE
135 South LaSalle Street
Chicago, Illinois 60603

By: Charles W. Boand
Of Counsel

Attorneys for Third-Party Defendant Empire National Bank:

CADWALADER, WICKERSHAM & TAFT
One Wall Street
New York, New York 10005

By: George D. Reycraft
Of Counsel

Attorneys for Third-Party Defendants "Aristocrat Group":

SQUADRON, GARTENBERG, ELLENOFF & PLESENT
551 Fifth Avenue
New York, New York 10017

By: Theodore Ellenoff
Neil Goldman
Of Counsel

Attorneys for Third-Party Defendant Herman L. Meckler:

RUBIN BAUM LEVIN CONSTANT & FRIEDMAN
598 Madison Avenue
New York, New York 10022

By: Stephen A. Marshall
Of Counsel

Attorneys for Joseph A. Bonura:

HAL MEYERSON, ESQ.
80 Broadway
New York, New York

Exhibit B

United States Court of Appeals

SECOND CIRCUIT

77-3020

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of April , one thousand nine hundred and seventy-seven.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. ROBERT P. ANDERSON

HON. WILLIAM H. MULLIGAN

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
APR 12 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

In Re: Arthur Anderson & Co., Herman L. Meckler and Empire National Bank
Petitioner
State Mutual Life Insurance Co. of America, et. al.
Plaintiffs-Respondents
v.
Arthur Anderson & Company,
Defendant-Petitioner

77-3020

Arthur Anderson & Co.
Defendant and Third Party
Plaintiff-Petitioner
v.

Empire National Bank (as successor in interest to County National Bank) and Herman L. Meckler,
Third Party Defendants
Petitioners
and
Joseph A. Bonura, et.al.,
Third Party Defendants.

Treating the joint petitions for leave to appeal or for a writ of mandamus or prohibition filed herein with a motion for an expedited appeal as a writ of mandamus and oral argument having been heard thereon,

Upon consideration thereof

It is ordered that said petition for a writ of mandamus be and it hereby is granted.

A. DANIEL FUSARO
Clerk

by Edward J. Guardaro
Edward J. Guardaro
Senior Deputy Clerk

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of April , one thousand nine hundred and seventy-seven.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. ROBERT P. ANDERSON

HON. WILLIAM H. MULLIGAN,

Circuit Judges.

77-3020

In re: ARTHUR ANDERSON & CO., HERMAN L. MECKLER and EMPIRE NATIONAL BANK,
Petitioner,
STATE MUTUAL LIFE INSURANCE CO. OF AMERICA, et al.,
Plaintiffs-Respondents,
v.
ARTHUR ANDERSON & COMPANY,
Defendant-Petitioner.

ARTHUR ANDERSON & CO.,
Defendant and Third Party
Plaintiff-Petitioner
v.
EMPIRE NATIONAL BANK (as successor in interest to County National Bank) and HERMAN L. MECKLER,
Third Party Defendants
Petitioners
and
JOSEPH A. BONURA, et al.,
Third Party Defendants.

This more complete statement of our reasons for granting the petition for writ of mandamus in this case will supersede the extemporaneous remarks delivered from the bench upon conclusion of argument before this panel called into emergency session on Tuesday afternoon, April 12.

Judge Werker rested his extraordinary and unsual action in part on the principle enunciated in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). But, since the state interest involved here is merely avoidance of the burden and cost of a hung jury, it is obviously not a state substantive rule required by Erie to be applied in a federal court diversity suit. The New York rule is primarily procedural, and it is not an "integral" part of any state-created right. Cf. Byrd v. Blue Ridge Elec. Co., 356 U.S. 525 (1968). Accordingly, we are not compelled by New York C.P.L.R. §4113(a) to permit non-unanimous verdicts on pendent state claims.

The respondents urge as an alternative for sustaining Judge Werker's proposed change abandoning the long-established and accepted rule in the federal courts that the verdict must be unanimous, that neither the Seventh Amendment nor Rules 38 and 48, Fed.R.Civ.Pro., compel a rule of unanimity. Thus, they argue, the district judge was free in the sound exercise of his discretion under Rule 83, Fed.R.Civ.Pro., and Southern District Local Rule 15, to apply New York State's 5/6 verdict procedure to this case. But, we cannot accept or endorse the judge's proposal that would abruptly alter the federal rule of unanimity in the mid-stream of the jury's deliberations, especially after the jury was carefully instructed by the judge on two separate occasions that its verdict must be unanimous and after it had continued its deliberations for ten days pursuant to those instructions. Such a deviation from the traditional federal rule of unanimity, utilized by the judge as an expedient to extract a verdict at any cost constituted, in our view, an abuse of discretion.

Indeed, we consider the unprecedented course of action proposed by the district judge, who knew that only a single hold-out survived the delivery of his modified Allen charge, as endangering the integrity of the jury function and the sanctity of deliberations once begun. Moreover, to permit a 5/6 verdict on a state common law claim while preserving the requirement of unanimity on the federal securities law claim risks serious confusion of this jury. In addition, it would be anomalous to observe one district court judge permitting a 5/6 verdict in pendant state claim cases or diversity of citizenship cases while all other judges required unanimity under similar circumstances for a verdict. Accordingly, we believe the issuance of the extraordinary writ of mandamus is clearly called for here.

We need not reach the question whether the Seventh Amendment requires unanimous verdicts in civil cases. Cf. Colgrove v. Battin, 413 U.S. 149 (1973). Nor do we pass on whether a duly enacted district court local rule permitting less-than-unanimous verdicts will withstand constitutional scrutiny. It is our holding that, under the unusual circumstances here, the abrupt departure, especially during the jury's deliberations, from what the district court acknowledged was "the existing federal rule with respect to trial by jury," op. at 2, cannot be condoned.

Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge.

Robert P. Anderson (IRK)
ROBERT P. ANDERSON

William H. Mulligan (IRK)
WILLIAM H. MULLIGAN,
Circuit Judges.

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